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Legislative Bulletin…….……..…...….……January 26, 2009

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Key Conservative Concerns

Take-Away Points

--S. 181 invites the filing of stale claims. By eliminating any statute of limitation on employment discrimination claims the bill encourages claims to be filed years, or even decades, after an injustice may have occurred.

--S. 181 feeds into the hands of trial lawyers and will encourage frivolous lawsuits, which is already a serious problem under current law.

For more details on these concerns, see below.

S. 181 – Ledbetter Fair Pay Act (*Mikulski, D-MD*)

Order of Business: The legislation is scheduled to be considered on Tuesday, January 27, 2009 under an expected closed rule.

Major Changes Since the Last Time This Legislation Was Before the House: There are no major changes in this bill since it was last considered in the 110th Congress (H.R. 2831) or in the 111th Congress as (H.R. 11). **This bill, S. 181, is exactly the same as the Ledbetter Fair Pay Act which passed the House on January 9, 2009 by a vote of 247-171.** When the House originally passed H.R. 11, it also attached the Paycheck Fairness Act (H.R. 12). The version coming back to the House for consideration tomorrow is only the Ledbetter portion of the bill.

Summary: S. 181 would negate the *Ledbetter v. Goodyear Tire & Rubber Co.* (*2007*, No. 05-1074) decision and change current law to allow wage-discrimination claims based on sex **PLUS** race, color, religion, or national origin "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is **affected by** application of a discriminatory compensation decision or other practice, **including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice**." (emphasis added) This change would allow for EEOC complaints (and damages) for actions

outside the current statutory timeframe of 180 days – allowing for claims to be filed decades after they may have occurred.

In addition to any damages already allowed by law, S. 181 would allow for the recovery of back pay for up to two years preceding the filing of the charge, "where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge."

In other words, if S. 181 had been in effect for the Ledbetter case, Ledbetter would have been able to collect damages for 19 years of alleged discrimination *plus* two years of back-pay at a non-discriminatory level (which is presumably the highest pay level for someone doing related work to hers).

The bill would also apply this change in wage-discrimination claims to the respective laws regarding discrimination based on age, disability, and rehabilitation.

Note: This legislation would be deemed effective as of May 28, 2007—the day prior to the Ledbetter decision.

Additional Background: Lilly Ledbetter sued the Goodyear Company for nineteen years of alleged sex-based salary discrimination (a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e to 2000e-17). During her career at Goodyear in Alabama, in which Ledbetter worked at various positions, she was frequently given low ranks in her annual performance reviews and consequently received lower raises and less pay than her male coworkers. Goodyear argued that 42 U.S.C. 2000e-5(e)(1) requires a person to file a wage-discrimination complaint with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged illegal employment practice, which would make most of Ledbetter's nineteen year long claim inapplicable. According to Goodyear, the only employment decision that could properly be the focus of Ledbetter's complaint was the annual review that occurred within 180 days prior to her EEOC complaint.

The U.S. Court of Appeals (11th Circuit) agreed with Goodyear, holding that an employee's complaint can include only the last action that affected her salary within 180 days before the complaint.

On May 29, 2007, the Supreme Court of the United States concurred with the appeals court's opinion, ruling 5-4, in *Ledbetter v. Goodyear Tire & Rubber Co.* (No. 05-1074), that a plaintiff may only bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period (irrespective of whether the disparate pay is the alleged result of intentionally discriminatory pay decisions that occurred outside of the limitations period). In other words, an EEOC complaint cannot "reach back" to time periods outside the legal timeframe.
http://www.law.duke.edu/publiclaw/supremecourtonline/certgrants/2006/ledvgoo.html

To read the *Ledbetter* decision, visit this webpage: http://www.supremecourtus.gov/opinions/06pdf/05-1074.pdf.

RSC Bonus Fact: The jury in district court initially awarded Ledbetter $3,514,417 in total damages. http://www.law.duke.edu/publiclaw/supremecourtonline/certgrants/2006/ledvgoo.html

Committee Action: The bill has not been reported out of Committee in the 111th. On June 22, 2007, the bill was referred to the Education and Labor Committee, which, five days later, marked up and ordered the bill reported to the full House by a party-line vote of 25-20. It passed the House on July 31, 2007 by a vote of 225 – 199.

Possible Conservative Concerns: Some conservatives may be concerned, as the statement of minority views from the committee report in the 110th Congress notes, that the bill "virtually eliminates the statute of limitations with respect to almost every claim of discrimination available under federal law, and potentially broadens the scope and application of civil rights laws to entirely new fact patterns, practices, and claims. It is no exaggeration to say that H.R. 2831 represents the most comprehensive revision to our nation's civil rights laws to be given serious consideration by the Committee in almost two decades." The committee Republicans further assert that the bill would "allow an employee--or any individual who can arguably claim to be 'affected' by an allegedly discriminatory decision relating to compensation, wages, benefits--or any other practice--to sue for discrimination that may have occurred years or even decades in the past." Some conservatives may be seriously concerned about such a prospect. In summation, the minority views assert that "…H.R. 2831 is fundamentally flawed on almost every level. It proceeds from faulty assumptions; it adopts flawed new constructions of law; and it expands the scope of liability under our nation's civil rights laws exponentially."

Note this statement from the Chamber of Commerce in its KEY VOTE ALERT: "H.R. 11 also contains numerous technical problems, such as appearing to expand the class of individuals with standing to bring a claim, application to unintentional disparate impact claims, and the creation of springing causes of action that could operate when an individual receives retirement benefits." They continue to say that "…this legislation would dramatically expand the number of frivolous and otherwise questionable cases to which employers would be subject."

A joint letter from employers such as the Associated Builders & Contractors, the Associated General Contractors, the National Association of Manufacturers, the National Restaurant Association and over twenty others, reports that, "the Equal Employment Opportunity Commission reported that it found reasonable cause in only 5% of the over 82,000 charges of discrimination that it received in FY2007 and found "no cause" for discrimination in 59% of the charges (amounting to 42,979 "no cause" charges)." Conservatives may be concerned that H.R. 11 would only increase these numbers in future years, since older claims are more subject to faded memories, missing documents, unfound witnesses, and businesses that have changed hands or no longer exist.

Administration Position: Although there was no Statement of Administration Policy (SAP) on H.R. 11 or S. 181 at press time, the Administration was opposed to H.R. 2831 when considered by the House in the 110th Congress. The SAP stated, "H.R. 2831 constitutes a major change in, and expanded application of, employment discrimination law. The change would serve to impede justice and undermine the important goal of having allegations of discrimination expeditiously resolved. Furthermore, the effective elimination of any statute of limitations in this area would be contrary to the centuries-old notion of a limitations period for all lawsuits. If H.R. 2831 were presented to the President, his senior advisors would recommend that he veto the bill."

Cost to Taxpayers: CBO estimated in 2008 that this bill, "Would not significantly increase costs to the EEOC or to the federal courts over the 2008-2012 period."

Does the Bill Expand the Size and Scope of the Federal Government?: No, but it would significantly expand the application of current anti-wage-discrimination law.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: The bill was not reported out of Committee in the 111th. However, last Congress, the Education and Labor Committee, in House Report 110-237, asserts that, "H.R. 2831 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

House Rule XXI, Clause 9(d) defines "earmark" as "a provision or report language included primarily at the request of a Member, Delegate, Resident Commissioner, or Senator providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process."

Constitutional Authority: In the last Congress, the Education and Labor Committee, in House Report 110-237, cites constitutional authority in the Equal Protection Clause (14th Amendment, Section 1), the Commerce Clause (Article I, Section 8, Clause 3), and the Due Process Clause (14th Amendment, Section 1).

Note: Article VI, Clause 3 of the U.S. Constitution states that, "The Senators and Representatives…and all executive and judicial Officers…shall be bound by Oath or Affirmation, to support this Constitution."

Outside Organizations that opposed H.R. 11 when it was in the House on Jan. 9th:

- Alliance for Worker Freedom

- Associated Builders and Contractors
- American Hotel & Lodging Association
- College and University Professional Association for Human Resources
- Eagle Forum
- HR Policy Association
- International Franchise Association
- International Public Management Association for Human Resources
- National Association of Convenience Stores
- National Association of Manufacturers
- National Public Employer Labor Relations Association
- National Restaurant Association
- National Retail Federation
- Society for Human Resource Management
- U.S. Chamber of Commerce

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